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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11	SEAN E. BRAZIL,	)	Civil No. 07cv0082 L(RBB)
12	Petitioner,	)	
13	v.	)	<b>ORDER DENYING MOTION FOR</b>
14	BEN CURRY, <i>et al.</i> ,	)	<b>CERTIFICATE OF APPEALABILITY</b>
15	Respondents.	)	<b>[doc. #15] and REQUEST FOR LEAVE</b>
16	_____	)	<b>TO FILE A LATE APPEAL</b>

17 Sean E. Brazil, appearing *pro se*, sought a writ of habeas corpus. In response to his  
18 amended petition, respondents filed a motion to dismiss contending that his claims were  
19 foreclosed by being untimely under the Antiterrorism and Effective Death Penalty Act of 1996  
20 (“AEDPA”). The motion was referred to the Honorable Ruben B. Brooks for a Report and  
21 Recommendation (“Report”) under 18 U.S.C. § 636(b). After petitioner filed his response in  
22 opposition to the motion to dismiss, the magistrate judge filed his Report recommending that the  
23 petition be dismissed as time barred. Petitioner filed objections and an amended objection to the  
24 Report. The Court adopted the Report, overruled petitioner’s objections, and entered judgment  
25 on August 26, 2008. [Doc. Nos. 12, 13.] On October 6, 2008, petitioner filed a notice of appeal  
26 and motion for certificate of appealability. Within the notice of appeal, petitioner requests leave  
27 to file a late appeal.

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1 **A. Certificate of Appealability**

2 A certificate of appealability is authorized "if the applicant has made a substantial  
3 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard,  
4 petitioner must show that: (1) the issues are debatable among jurists of reason; or (2) that a court  
5 could resolve the issues in a different manner; or (3) that the questions are adequate to deserve  
6 encouragement to proceed further. *Lambright v. Stewart*, 220 F.3d 1022, 1024-25 (9th Cir.  
7 2000), citing *Slack v. Mc Daniel*, 529 U.S. 473 (2000), and *Barefoot v. Estelle*, 463 U.S. 880  
8 (1983). Petitioner does not have to show "that he should prevail on the merits. He has already  
9 failed in that endeavor." *Lambright*, 220 F.3d at 1025, citing *Barefoot*, 463 U.S. at 893 n. 4.  
10 Nevertheless, issuance of the COA "must not be pro forma or a matter of course," and a  
11 "prisoner seeking a COA must prove 'something more than the absence of frivolity' or the  
12 existence of mere 'good faith' on his or her part." *Barefoot*, 463 U.S. at 893.

13 As discussed in the Court's Order adopting the Report, respondents filed a motion to  
14 dismiss the petition contending that all of petitioner's claims were untimely under AEDPA. As a  
15 result, respondents did not address the merits of petitioner's claims. Petitioner asserted in  
16 response to the motion to dismiss that he was entitled to equitable tolling because he was unable  
17 to obtain court transcripts of a pretrial hearing, he was misled by a statement made by a  
18 California Supreme Court Clerk, and respondents waived their right to dismiss his petition as  
19 untimely. The magistrate judge made a thorough review of the timing of petitioner's filings in  
20 state and federal court and found the present petition time-barred. Applying the applicable Ninth  
21 Circuit law concerning equitable tolling to the facts presented by petitioner, the magistrate judge  
22 found, and the undersigned concurred, that it was not impossible for petitioner to timely file his  
23 federal habeas petition in the absence of pretrial transcripts. Accordingly, the Court adopted that  
24 Report's recommendation that petitioner was not entitled to equitable tolling.

25 The Court also reviewed petitioner's contention that he was entitled to equitable tolling  
26 on the basis of actual innocence – a claim first raised in his objection to the Report. The Court  
27 applied the standard found in *Schlup v. Delo*, 513 U.S. 298, 327 (1995) which requires that a  
28 petitioner must affirmatively prove that he is probably innocent. Finding that petitioner had not

1 demonstrated in any manner why he was probably innocent other than his own statement that he  
2 was not guilty, the Court determined that petitioner was not entitled to equitable tolling on the  
3 basis of actual innocence.

4         Given the uncontested state of the record and the legal analysis supporting its decision,  
5 the Court must conclude that petitioner is not entitled to a certificate of appealability because (1)  
6 the issue is not debatable among jurists of reason; or (2) a court could not resolve the issue in a  
7 different manner; or (3) the question is inadequate to deserve encouragement to proceed further.

8 **B. Request to File Untimely Appeal**

9         Petitioner acknowledges that his Notice of Appeal filed on October 6, 2008 is untimely  
10 under Federal Rule of Appellate Procedure 4(a)(1)(A). But petitioner contends he did not  
11 receive the August 26, 2008 Order adopting the Report and Recommendation and the Judgment  
12 until September 26, 2008. Petitioner states that he was transferred to another institution and  
13 there were “delays beyond Petitioner’s control.” (Notice of Appeal at 2.)

14         The district court may extend the time to file a notice of appeal if a party moves “no later  
15 than 30 days after the time prescribed by this Rule 4(a) expires” and there is a showing of  
16 excusable neglect or good cause. FED. R. APP. P. 4(a)(5)(A)(i), (ii).

17         Here, petitioner has not filed a motion seeking an extension of time in which to file his  
18 Notice of Appeal. Instead, petitioner inserted his request within the body of his Notice of  
19 Appeal which he filed during the 30 days after the time prescribed by Rule 4(a)(1)(A).  
20 Notwithstanding petitioner’s failure to file a proper motion, the Court considers his request for  
21 leave to file a late notice of appeal.

22         Because his request was filed after the time had expired to file a notice of appeal under  
23 Appellate Rule 4(a)(1)(A), petitioner was required to provide notice to the other parties in this  
24 action “in accordance with local rules.” Petitioner’s certificate of service attests to his mailing  
25 of the notice of appeal and motion for a certificate of appealability to the Court only and not with  
26 respect to the parties in this case.

27         Because petitioner failed to file a motion seeking leave to file a late appeal and to provide  
28 notice to opposing counsel of his request, the Court will deny without prejudice petitioner’s


1 request to file an untimely appeal. Petitioner is cautioned that if he intends to file a motion for  
2 leave to file a late appeal, he must do so within the time constraints provided by Rule  
3 4(a)(5)(A)(i).

4 **CONCLUSION**

5 Based on the foregoing, petitioner's motion for a certificate of appealability is **DENIED**.  
6 Petitioner's request for leave to file a late appeal is **DENIED WITHOUT PREJUDICE**.

7 **IT IS SO ORDERED.**

8 DATED: October 16, 2008

9   
10 M. James Lorenz  
United States District Court Judge

11 COPY TO:

12 HON. RUBEN B. BROOKS  
13 UNITED STATES MAGISTRATE JUDGE

14 ALL PARTIES/COUNSEL  
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